The Afghanistan Saga did not Rupture the Orientation of International Law and Relations

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Not all that long after the 9/11 attacks in the United States, I argued in two articles in the Osgoode Hall Law Journal (here and here) that the tragic events of that day, and the reactions of the US and its close allies, were not so significantly new in global (as opposed to national history) as to require or go on to inscribe marked changes in the character of the most fundamental norms and patterns of international law and relations. In the present blogpost, I argue that the intervening twenty years of US invasion and occupation of, nation-building in, and withdrawal from Afghanistan has provided strong justification for the analytical conclusions I reached in 2005.

More specifically, neither international law's broad attitudes toward the framings and dramas of world politics and events nor the general character of the behaviour of global power toward much weaker states and their peoples were ruptured to a significant extent within the context or because of the invasion, occupation, semi-occupation and recent withdrawal of US and allied forces from Afghanistan. Thus, while the withdrawal phase of allied involvement in Afghanistan has, quite deservedly, generated a lot of attention, controversy and tragedy, broadly speaking, it has not – so far – caused or signaled any significant rupture in the orientation of international law and relations toward weaker states and peoples. As the dust of that controversial set of events begins to settle, as the horizon becomes more visible, continuity is much more evident to the trained eye than discontinuity. Thus, the Afghanistan saga is but an allegory of the broadly repeating historical character of international law and relations, albeit with certain attenuations and divergences in terms of the details.

A Broad Pattern of Continuity

This does not necessarily mean that there has been no change whatsoever in international law and relations in the context and because of the Afghanistan saga, howsoever slight. What is meant, rather, is that the recent withdrawal events on which this blogpost is mostly focused, and the invasion and occupation that preceded it, have not (at least as yet) wrought any broad shifts that are of fundamental significance to the character of international law and relations. For sure, the withdrawal has meant that one established superpower (the US) has now offered appreciably more "space" for an emergent one (China) to exercise greater influence in Afghanistan. Yet, this broad shift in the distribution of global power (material, and to a lesser extent, ideational), with its possibly attendant creeping implications for international legal praxis, was already well underway, both in Asia (the region of which Afghanistan is an integral part) and right across the globe. For sure, it may

have become somewhat more difficult for the more established superpower of our time to “police” Afghanistan and the neighbourhood around it. Still, this reality has had no great bearing on the broad character of international law and relations.

International law’s norms and rules regarding when and by whom “sovereign” countries can be invaded; the legality or otherwise of occupying other countries; the responsibilities of occupying and semi-occupying powers; respect for the human rights of the locals; and refugeehood/asylum; basically remain intact post the Afghanistan invasion and withdrawal. The broad historical character of international relations in which much more powerful states have (within and outside the bounds of international law norms/rules) tended to take steps to augment, maintain and project their material and ideational power over much weaker states and peoples (including escaping responsibility for the most part for their breaches of their responsibilities to these), also remains as stable in the aftermath of the Afghanistan saga.

Without sufficient space to delve into all the relevant bodies of international law, the broad argument being made here is illustrated by the extent of *relative* continuity and stasis within two of the sub-bodies of international law and relations that frame, and connect intimately to, the withdrawal phase of the Afghanistan saga. These are: (a) the international law that governs or relates to the invasion of other countries; and (b) international human rights law. Neither of these sub-bodies of international law was ruptured or altered in significant measure by either the full cycle of the Afghanistan saga or its recent withdrawal phase.

On the Relative Continuity of the International Law on the Invasion of Foreign Countries

Regarding the impact that the withdrawal phase of the Afghanistan saga (or even of the full cycle of US and allied involvement) has had on the international law norms/ rules governing the invasion of other states, the norms prohibiting such interventions, save either with UN Security Council authorization or in self-defence “if an armed attack occurs,” have not changed significantly since 9/11, and certainly not since the withdrawal from Afghanistan. They are also unlikely to change in any appreciable way. About five years after 9/11, in the heat of arguments by the US and certain other great powers that this body of norms ought to adapt to what was argued was our “new” circumstance, James Thuo Gathii undertook a painstaking analysis of the relevant state practice and normative attitudes to see if a new norm justifying unilateral invasions of other lands had emerged in international law. His findings were that the relevant norms had remained more or less stable, despite these claims and the US-led invasions of Afghanistan and Iraq. The arguments he made at the time remain so strong, convincing and clear as to deserve extensive reproduction here. As he put it:

“…under the doctrine of sources [of international law], state practice inconsistent with a norm of customary international law or persistent dissension from it, does not establish a new norm but is instead regarded a violation of the norm… a small number of states cannot within a limited time frame create a new rule without ,a

very widespread and representative participation‘ in the practice…a small number of states cannot create a new rule of customary international law where there is practice which conflicts with the rule or where there are protests to the new rule. This is particularly so with respect to a rule relating to the prohibition of the use of force which is a ‚conspicuous example of a rule of international law having the character of jus cogens‘ with respect to which practice inconsistent with it would be regarded as a violation of the norm rather than as establishing a new norm.”

And although Gathii’s conclusions were based on pre-2005 data, there is nothing that has occurred in international legal practice since that time to even remotely suggest that a new customary international law norm that deviates from the UN Charter in authorizing Afghanistan-type forcible invasions and occupations of other lands has emerged. The required widespread state practice simply does not exist. And it is also crystal clear that neither the text of the UN Charter nor its widely accepted interpretations have changed significantly since then (see arguments by Edward C. Luck and Oona A. Hathaway). It is also important to note that even if the US could have argued that its invasion of Afghanistan was lawful under international law as an act of self-defence, it would be on far shakier and much more untenable ground if it were to suggest that its subsequent occupation (*de jure* and *de facto*) was similarly justified. And although, for sure, the relevant international law norms have been violated from time to time, that does not in of itself inscribe or portend a rupture in the character and orientation of the law.

In the end, the key point, relevant to the withdrawal phase of the US’ recent forcible encounter with Afghanistan, is this: Rather than the withdrawal being seen as signaling rupture, or some kind of aberration at the nexus of law, practice and morality, it should rather be seen as a belated act of compliance with a fundamental norm of international law, and indeed, as an act that was required of the US under that legal regime. At the very least, the withdrawal was required in order to abate and ameliorate what most other states and scholars see as its longstanding violation of the general prohibition under international law of the unilateral use of force against the territorial integrity and political independence of other states (see Muqarrab Akbar and Mahdi Zahraa). Thus, in a sense, the withdrawal aligned US behaviour in this context with the requirements of international law.

A related point is that, as disturbing as the televised scenes and spectacles of massive crowds attempting to flee the oppressions of Taliban rule were, they do not alter the basic content and orientation of international law and relations. They do not mean that unilateral foreign invasions and continued occupations of other states in order to prevent such scenes or rights such wrongs are lawful or have somehow become more justified under international law. They do not also mean that most states would participate in, or sanction, such invasions. Such tragic scenes of human beings, who are just like us all, desperately attempting to flee to freedom or preserve their lives do not in and of themselves alter the constitutional norms of international law and relations which govern foreign invasions or continued occupations of other lands. Despite many identifiable breaches of its terms over history, and arguments by some in favour of both a right to pro-democratic invasions (see i.e., W. Michael Reisman, Robert Lancaster, and David Wippman) and the existence of a right to

democracy in international law (see Thomas M. Franck), there is no general authority in international law for unilateral interventions (even if aided by allies) to invade or continue the occupation of other lands, in order to preserve human rights or foster democracy. Clearly, there is an important difference between the vesting of human rights in the peoples of a particular country and the nature of the allowable means for foreign states to advance their protection or enforcement. This much is clear enough from the relevant legal provisions (Articles 1 and 2 of the *Charter of the United Nations*) and state practice (see Ann Orford). While the nature of the relevant norms/ rules of international law and the allowed practices can, of course, change, there is not as yet convincing evidence of such discontinuity. These points have relevance and important implications for the ability or otherwise of the US and other countries to rescue from Taliban rule certain individuals still left behind in Afghanistan, who provided assistance to it whilst its forces and agents were in that country, as well as for the methods they are allowed to use to do so under international law.

On the Relative Stability of International Human Rights Law post the Afghan Saga

Along these lines, the second sub-body of international law and relations that is focused on in this blogpost is international human rights law, and with a similar argument and conclusion. For, neither the withdrawal phase of the Afghanistan saga or the full cycle of the US-led invasion has caused a significant rupture in the fabric and orientation of international human rights law and relations.

There is no doubt whatsoever that throughout the full cycle of their invasion, occupation, semi-occupation of, and withdrawal from, Afghanistan, the US and its allies were under the obligation to respect the human rights of the people of that country (see Gilles Giacca and Ellen Nohle). In any case, having partly created the conditions that prevailed in Afghanistan immediately before, during and after the withdrawal, the US and its allies are, under international law, responsible for its negative human rights impacts on the Afghan people (see Rebecca Sanders). In each case, this means that the US was, until its final pullout from Afghanistan, also under an obligation not to take any steps or measures that would violate, or otherwise endanger, the human rights of Afghans.

One key issue that arises in this context is the nexus between the US' actions in withdrawing from Afghanistan and the human rights violations suffered or likely to be suffered by many Afghans (e.g. those who died in ISIS-K perpetrated bombings at the Kabul airport while awaiting evacuation; the greatly augmented women's rights violations that have since occurred; and the collapse of democracy in Afghanistan with its entailed human rights violations). Was it reasonably foreseeable that the US' actions either in invading, formally occupying (up to a point), and/or withdrawing from Afghanistan would lead to any of these kinds of human rights violations in that country? The US government, not without plausible cause or reason could argue that some of these violations were not reasonably foreseeable and that it did take every possible step that it could to prevent such occurrences. Others (even within the US itself) might disagree, again not without good reason. Clearly, this discussion also

has much relevance and important implications for the lives and rights of all Afghans, and especially certain individuals still in that country who might be targeted and victimized for assisting US forces and agents in that country (see David Zucchino and Najim Rahim).

In the end, it should be noted that there could be a clash here between the US' obligation under international law to withdraw from Afghanistan, following its invasion and occupation of that country and its obligation not to take any steps or measure that would endanger the human rights of the Afghan people. This clash could be resolved – at least in part – by the framing of the US' obligation to withdraw as an obligation to undertake their withdrawal in the way that least endangers the human rights of the Afghan people (i.e. very slowly over a much longer period). Given the socio-political (especially strategic and military) realities in Afghanistan, the problem with this kind of reframing, however, is that it might – in practice – require the US not to withdraw from that country for many more decades to come.
